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WORKING THROUGH THE STATIC: IS THERE ANYTHING LEFT TO LOCAL CONTROL IN THE SITING OF CELLULAR AND PCS TOWERS AFTER THE TELECOMMUNICATIONS ACT OF 1996?

I. INTRODUCTION

On February 8, 1996, in the elaborate reading room of the Library of Congress, President Bill Clinton signed an historic piece of legislation heralded to unleash America's great competitive might.¹ After several years of partisan, corporate and consumer interest wrangling, the Telecommunications Act of 1996² ("TCA") became law.³ The telecommunications industry in 1996 was a vastly different industry than when the last piece of federal telecommunications legislation was written in 1934.⁴ The telecommunications industry of 1934 consisted mainly of the radio networks and the AT&T monopoly over telephone service.⁵ By stark contrast, the telecommunications industry of the 1990s is vastly diversified, offering not only traditional telephone, radio and television broadcasts, but also cable television, direct broadcast satellite ("DBS") services, e-mail, the world wide web, teleconferencing and personal wireless service ("PWS") such as cellular phone service.⁶

1. See Mike Mills, *Ushering in a New Age in Communications; Clinton Signs 'Revolutionary' Bill into Law at a Ceremony Packed with Symbolism*, WASH. POST, Feb. 9, 1996, at C1 (reporting on signing of historic legislation). Before signing the legislation, President Clinton said, "[I]t [the legislation] clearly enables the age of possibility in America to expand to include more Americans. It will create many, many high-wage jobs. It will provide more information and more entertainment to virtually every American home." White House Publications, *Remarks by the President in Signing Ceremony for the Telecommunications Act Conference Report* (Feb. 8, 1996) (visited Nov. 1, 1998) <<http://www.pub.whitehouse.gov/uri-res/I2R?urn:pdi:/oma.eop.gov.us/1996/2/8/9.text.1>>.

2. Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified as enacted and amended in scattered sections of 15 U.S.C., 18 U.S.C. and 47 U.S.C.).

3. See Richard Zoglin & Georgia Harbison, *We're All Connected the Long-Awaited Telecommunications Bill Sweeps Away Old Boundaries. Get Ready for a Free-For-All*, TIME, Feb. 12, 1996, at 52 (stating that TCA's passage was fraught with partisan and interest group wrangling).

4. See NATIONAL LEAGUE OF CITIES, THE TELECOMMUNICATIONS ACT OF 1996: WHAT IT MEANS TO LOCAL GOVERNMENTS 5 (1996) (describing historical backdrop of Communications Act of 1934, ch. 652, 48 Stat. 1064 (1934) (current version codified as amended in scattered sections of 47 U.S.C.)); see also Robert A. Heverly, *Dealing with Towers, Antennas, and Satellite Dishes*, LAND USE L. & ZONING DIG., Nov. 1996, at 3 (explaining urban and rural problems with telecommunications during 1930s).

5. See NATIONAL LEAGUE OF CITIES, *supra* note 4, at 5 (discussing historical urban and rural problems with telecommunications).

6. See Sara A. Evans, Note, *Wireless Service Providers v. Zoning Commissioners: Preservation of State and Local Zoning Authority under the Telecommunications Act of*

The goal of the TCA was to deregulate the industry and to allow for the expansion of new technologies.⁷ Deregulation did not just involve dismantling federal regulation, but also dismantling any state or local regulation that constituted a barrier to entry into the market.⁸ Specifically, the TCA preempted some of local government's traditional zoning power over the siting of PWS facilities, namely towers.⁹ Although the TCA expressly states that Congress preserved traditional zoning authority over PWS tower sitings, a substantial portion of that authority was preempted.¹⁰ The issue for both the courts and local governments is how much zoning authority has been preserved.¹¹ Evidenced by a dizzying amount of litigation since the TCA's passage in February of 1996, all of the players—the courts, zoning hearings boards, industry and the public at large—are confused and concerned about this divisive issue.

This Comment will examine the capacity of a local government to regulate the siting of PWS towers under the TCA. Part II will lay out a picture of the debate both in historical and current contexts. It addresses the rise of the PWS industry and what that rise means for local governments and their constituents.¹² It then examines the goals of the TCA and its regulatory or "de-regulatory" framework in the PWS tower siting area.¹³ Part III offers a detailed analysis of how the courts have interpreted the

1996, 32 GA. L. REV. 965, 973-74 (1998) (commenting on vast increase in existing telecommunications technology).

7. See H.R. CONF. REP. NO. 104-458, at 1 (1996) (stating that TCA provides, "a pro-competitive, de-regulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition . . .").

8. See NATIONAL LEAGUE OF CITIES, *supra* note 4, at 13 (explaining that TCA preempts state and local regulation prohibiting telecommunications providers from entering market).

9. See 47 U.S.C. § 332(c)(7) (1994 & Supp. 1997) (restricting ways that state and local governments may zone siting of PWS facilities); see also John H. Gibbon, *The Telecommunications Act of 1996 and Its Impact of Municipal Regulation*, 28 URB. L. 737, 743-44 (1996) (describing TCA's restriction on zoning of PWS facilities); Heverly, *supra* note 4, at 3 (discussing TCA restrictions).

10. See 47 U.S.C. § 332(c)(7) (stating that zoning authority is preserved yet enumerating limitations thereof); see also Gregory Tan, Note, *Wading Through the Rhetoric of the Telecommunications Act of 1996: Uncertainty of Local Zoning Authority over Wireless Telecommunications Tower Siting*, 22 VT. L. REV. 461, 463-65 (1997) (explaining contradictory language of TCA that preserves yet limits zoning authority).

11. See Tan, *supra* note 10, at 463-65 (stating that scope of TCA limitations on zoning of PWS facilities will have to be judicially determined).

12. For a discussion of the rise of the PWS industry and what that has meant for local governments and their constituents, see *infra* notes 17-33 and accompanying text.

13. For a discussion of the goals of the TCA and its regulatory or de-regulatory framework in the PWS tower siting area, see *infra* notes 34-49 and accompanying text.

breadth of the TCA's preemption of traditional zoning authority.¹⁴ Further, it examines the competing views on Congressional intent that underlie the federal courts' decisions—namely whether Congress intended sweeping or limited preemption of state and local zoning law.¹⁵ Finally, this Comment will argue that a narrow reading of the preemption provisions is the proper reading.¹⁶ Part IV summarizes this Comment's conclusions.

II. BACKGROUND

A. *What Does the PWS Industry Mean for Local Government?*

The purpose of this section is to give a brief overview of the PWS industry, including a description of the relevant technology—cellular versus personal communications service (PCS). Additionally, this section will explore how the PWS industry has been accepted by local government.

1. *Overview of the PWS Industry*

Fifteen years ago wireless telephones were almost unheard of, and they conjured up images of scenes from *Star Trek*.¹⁷ Today, there are nearly 38 million subscribers of wireless telephone services, a number that is expected to explode to 124 million by 2005.¹⁸ The TCA uses the broad term "personal wireless services" (PWS) to describe wireless telephones.¹⁹ The PWS industry provides basically two different types of wireless telephone services—cellular phone service and PCS service.²⁰ Cellular technology provides wireless telephone service via the transmission of low-power, point-to-point, two-way transmission radio waves.²¹ Cellular technology employs a system of "cells" to maximize usage of allocated frequen-

14. For a discussion of how the courts have interpreted the breadth of the TCA's preemption of traditional zoning authority, see *infra* notes 50-150 and accompanying text.

15. For a discussion of the competing philosophies that underlie the federal courts' decisions in this area, see *infra* notes 151-69 and accompanying text.

16. For a discussion of this Comment's conclusion that the proper interpretation of the preemption provisions is a narrow one, see *infra* notes 170-77 and accompanying text.

17. See Nancy M. Palermo, *Progress Before Pleasure: Balancing the Competing Interests of Telecommunications Companies and Landowners in Cell Site Construction*, 16 TEMP. ENVTL. L. & TECH. J. 245, 245 (1998) (noting that wireless telephone technology was not available until about 1982 and that in 1985 there were only approximately 200,000 subscribers of cellular phone service).

18. See *id.* at 245-46 (commenting on rapid increase of wireless telephone service subscribers).

19. See 47 U.S.C. § 332(c)(7)(C)(i) (1994 & Supp. 1997) (using and defining "personal wireless service").

20. See Tan, *supra* note 10, at 467-72 (explaining differences between cellular and PCS wireless technology).

21. See *id.* at 467 (explaining cellular technology).

cies.²² Cells are geographic areas, with each area containing a low-powered radio transmitter.²³ The radio transmitters then connect the cellular phone user with the larger wired telephone network.²⁴ Although some cellular systems use digital transmission technology, the majority still employ conventional analog transmission technology.²⁵ Additionally, cellular systems require towers that are higher than PCS towers, but that transmit over a larger cell.²⁶

Although PCS wireless service employs the same system of cells to integrate with the wired telephone network, it uses only digital transmission technology and a much higher frequency than cellular systems.²⁷ Because, however, PCS systems operate at higher frequencies, they require a greater number of towers in a given service area.²⁸

22. See NATIONAL LEAGUE OF CITIES ET AL., *SITING CELLULAR TOWERS: WHAT YOU NEED TO KNOW, WHAT YOU NEED TO DO* 3 (1997) (explaining how cell system expands usage of FCC allocated frequencies). Because the Federal Communications Commission ("FCC") allocates and limits the number of radio frequencies that telecommunications companies can use, cellular technology employs cells to maximize the usage of the FCC allocated frequencies. See *id.*

23. See Tan, *supra* note 10, at 467-69 (explaining cell concept).

24. See *id.* (stating idea of cell technology). The size and number of the cells in a particular region vary with the volume of cellular phone calls that are made therein. See *id.* (explaining why size and number of cells varies for different geographic coverage areas).

25. See NATIONAL LEAGUE OF CITIES, *supra* note 22, at 3 (noting that majority of cellular systems are analog).

26. See Stanley D. Abrams, *Update on the 1996 Telecommunications Act: Personal Wireless Services*, LAND USE L. & ZONING DIG., Apr. 1998, at 3, 5 (explaining that cellular phone towers or "monopoles" range from 150 feet to 199 feet in height and service area with 2.5 mile radius). By contrast, PCS towers are not as high but require a greater number because of the smaller service area. See *id.* (commenting on height differences of cellular and PCS towers).

27. See Tan, *supra* note 10, at 472 (describing PCS technology).

28. See Abrams, *supra* note 26, at 5 (describing PCS need for greater number of towers); see also Jenaba Jalloh, *Local Tower Siting Preemption: FCC Radio Frequency Guidelines are Solution for Removing Barriers to PCS Expansion*, 5 COMM. L. CONSPICUOUS 113, 113 (1997) (stating that "a PCS network requires four times the number of antennas and towers to transmit signals in order to meet the same coverage as cellular services").

Also related to the required number of towers for a given system type—PCS or cellular—are the issues of coverage and capacity. Coverage relates to geography—the need to have a tower presence in a region to offer wireless service. See Abrams, *supra* note 26, at 5 (distinguishing between coverage and capacity). Conversely, capacity relates to a tower need given the level of wireless usage in a given region. See *id.* When volume increases in a particular service area, capacity becomes an issue—can the existing PWS infrastructure support the volume demanded. See *id.*

Beyond the technological differences, PCS technology can support an expanded array of services beyond wireless telephone service. See Tan, *supra* note 10, at 471-72 (stating that PCS technology can support more services than cellular technology). PCS systems can also provide paging and data transmission (facsimile service), and in the future may be able to serve as a platform for computer networking and wireless Internet access. See NATIONAL LEAGUE OF CITIES, *supra* note 22, at 3 (explaining breadth of PCS technology).

2. *PWS Challenges Presented to Local Governments*

Despite the dramatic increase in demand for wireless service, there has been a correlative opposition to the siting of facilities needed to provide wireless service.²⁹ In areas where PWS towers have been proposed, neighbors at zoning board hearings across the country have voiced their concerns.³⁰ Concerns have ranged from diminution in property values, to aesthetics and to health effects.³¹ It has been the job of local government to balance these two interests—the demand for high quality and readily available PWS technology³² and citizen concerns over tower siting.³³ Because of this increased demand for PWS technology, local officials cannot avoid siting issues—local government, the PWS industry and residents have been forced to work these issues out.

B. *The Telecommunications Act of 1996 and Siting of PWS Towers*

1. *Legislative History*

Critics of the Communications Act of 1934 (the “CA”)—the pre-TCA federal regulatory framework—criticized the law as one that impeded competition by favoring existing technologies over emerging technologies.³⁴ The CA was interpreted and regulated by the Federal Communications Commission (the “FCC”).³⁵ Although the drafters of the CA sought to build in flexibility for future growth in the telecommunications industry, the CA through the FCC was unable to keep up with pace of innovation.³⁶

If the goal of the TCA was to remove barriers to entry into the market for emerging technology, the TCA had to address land use regulation—

29. See Jalloh, *supra* note 28, at 119 (discussing opposition to siting of PWS facilities).

30. See *id.* (explaining conflicts with PWS facilities).

31. See Susan Lorde Martin, *Communications Tower Sitings: The Telecommunications Act of 1996 and the Battle for Local Control*, 12 BERKELEY TECH. L.J. 483, 486-88 (1997) (discussing citizen concerns over PWS tower sitings).

Negative health effects caused by PWS towers are a major source of citizen anger and fear at zoning board hearings. See *id.* The fear stems from a belief that the electromagnetic fields created by the towers can cause cancer. See *id.* at 486.

32. See Abrams, *supra* note 26, at 5 (explaining how capacity and coverage issues affect need for more towers). The demand for new towers is illustrated both in the need for new towers to expand PWS coverage to areas that do not have the service and the need for new towers to remedy so called “coverage gaps”—areas where existing PWS capacity/infrastructure are inadequate to handle the increase in volume. See *id.*

33. See Palermo, *supra* note 17, at 257 (commenting on balancing of concerns).

34. See Heverly, *supra* note 4, at 3 (discussing shortcomings of Communications Act of 1934).

35. See 47 U.S.C. § 609 (1996) (creating FCC).

36. See David Hughes, *When NIMBYs Attack: The Height to Which Communities Will Climb to Prevent the Siting of Wireless Towers*, 23 J. CORP. L. 469, 474-75 (1998) (commenting on CA’s regulatory shortcomings).

the realm of local government. The drafters of the TCA recognized that offering PWS technology to citizens presented a challenge similar to the one faced during the advent of the wired telephone network nearly a century ago.³⁷ Namely, PWS technology needs a corresponding infrastructure.³⁸

Although Congress realized that they needed to preempt some local government zoning regulation to carry out the TCA's PWS goals, they also realized that they would have to do so gingerly. Because zoning was a traditional local government power, and because the drafters—the new Republican majority of the 104th Congress—embraced the ideals of the “new federalism,” the manner and degree of preemption was essential.³⁹ Some members favored delegating the task to the FCC, evidenced by the language in the original House bill.⁴⁰ Conversely, the final legislation adopted by the conference committee did not delegate authority to the FCC, but instead prescribed the parameters under which a local government could regulate the siting of PWS facilities.⁴¹ The final legislation recognized the needs of local government by retaining local decisionmak-

37. See Heverly, *supra* note 4, at 3 (explaining similarities between original challenges faced by wired telephone technology and PWS technology).

38. See Tan, *supra* note 10, at 466 (stating that “the federal goals of the TCA translate into a mandate for thousands of new antennas to emerge across the country, touching every community that the telecommunications industry serves”).

39. See, e.g., H.R. CONF. REP. NO. 104-458, at 207-08 (1996) (commenting that “the conference agreement creates a new section 704 [codified as 47 U.S.C. § 332(c)(7) (1994 & Supp. 1997) which prevents Commission [FCC] preemption of local and State land use decisions and preserves the authority of State and local governments over zoning and land use matters except in limited circumstances set forth in the conference agreement”). For an example of the new “federalism” that dominated the Republican controlled 104th Congress, see generally REPUBLICAN NATIONAL COMMITTEE, CONTRACT WITH AMERICA: THE BOLD PLAN BY REP. NEWT GINGRICH, REP. DICK ARMEY, AND THE HOUSE OF REPRESENTATIVES TO CHANGE THE NATION (Ed Gillespie & Bob Schellhas eds., 1994).

40. See H.R. 1555, 104th Cong. § 107 (1995) (authorizing FCC to prescribe national policy for siting of PWS facilities); see also H.R. REP. NO. 104-204(I), at 253 (1995) (explaining that PWS facility siting rules will be promulgated by FCC). Under the House version, the FCC would create a negotiated rulemaking committee comprised of PWS industry players as well as representatives from state and local government. See *id.* Based upon the recommendations of this committee, the FCC would promulgate national PWS facility siting rules. See *id.* The proposal was squarely defeated in the Committee because it completely removed siting issues from the control of local government—it simply took too much local control away. See H.R. CONF. REP. NO. 104-458, at 207-08 (1996) (noting rejection of House proposal); see also 142 CONG. REC. H1144 (daily ed. Feb. 1, 1996) (statement of Rep. Sensenbrenner) (“I strongly opposed a provision included in the House passed bill that would have allowed the Federal Communications Commission to issue rules that would preempt local zoning on where to site towers in any location, regardless of local concerns and the actions of local city councils and planning commissions, provided that they had obtained approval from an FCC bureaucrat in Washington.”).

41. See H.R. CONF. REP. NO. 104-458, at 207-08 (rejecting delegation to FCC). Final legislation was entitled “Preservation of Local Zoning Authority” and it blanketly claimed to preserve local authority, but effectively preempted some of

ing control, yet it remained true to its stated goals by prescribing the degree to which local governments could regulate.⁴²

2. *The Regulatory or De-regulatory Framework*

As stated previously, section 332(c)(7)⁴³ of the TCA provides a blanket statement expressly purporting to preserve local government control

that authority through exceptions to the general statement. *See* 47 U.S.C. § 332(c)(7) (1994 & Supp. 1997) (preempting some local zoning authority).

42. *See* 142 CONG. REC. H1144 (daily ed. Feb. 1, 1996) (statement of Rep. Goodlatte) (noting that final legislation “protects the rights of local governments to see that their zoning regulations are carried forward in making sure that, when new cell towers are located, they have the ability to determine . . . where they are placed while fairly making sure that those locations do not interfere with interstate commerce and with the opportunity to advance this new technology”). Rep. Goodlatte was a conference committee member. *See* H.R. CONF. REP. NO. 104-458, at 212.

43. 47 U.S.C. § 332(c)(7). This section provides:

(7) Preservation of local zoning authority

(A) General authority

Except as provided in this paragraph, nothing in this chapter shall limit or affect the authority of a State or local government or instrumentality thereof over decisions regarding the placement, construction, and modification of personal wireless service facilities.

(B) Limitations

(i) The regulation of the placement, construction, and modification of personal wireless service facilities by any State or local government or instrumentality thereof—

(I) shall not unreasonably discriminate among providers of functionally equivalent services; and

(II) shall not prohibit or have the effect of prohibiting the provision of personal wireless services.

(ii) A State or local government or instrumentality thereof shall act on any request for authorization to place, construct, or modify personal wireless service facilities within a reasonable period of time after the request is duly filed with such government or instrumentality, taking into account the nature and scope of such request.

(iii) Any decision by a State or local government or instrumentality thereof to deny a request to place, construct, or modify personal wireless service facilities shall be in writing and supported by substantial evidence contained in a written record.

(iv) No State or local government or instrumentality thereof may regulate the placement, construction, and modification of personal wireless service facilities on the basis of the environmental effects of radio frequency emissions to the extent that such facilities comply with the Commission's regulations concerning such emissions.

(v) Any person adversely affected by any final action or failure to act by a State or local government or any instrumentality thereof that is inconsistent with this subparagraph may, within 30 days after such action or failure to act, commence an action in any court of competent jurisdiction. The court shall hear and decide such action on an expe-

over PWS facility siting decisions, subject only to the enumerated requirements.⁴⁴ The statute imposes both substantive and procedural requirements on local governments.⁴⁵ There are three substantive requirements: (1) that the regulation shall not “unreasonably discriminate” among providers of “functionally equivalent services”; (2) that the regulation shall not prohibit or have the effect of prohibiting wireless service; and (3) that the local government cannot regulate on the basis of the environmental effects of radio frequency emissions if those facilities comply with relevant FCC regulations.⁴⁶ These three substantive requirements limit the basis on which a local government can decide PWS siting issues.⁴⁷

In addition to the three substantive requirements of section 332(c)(7), there are two procedural requirements: (1) that a local govern-

mented basis. Any person adversely affected by an act or failure to act by a State or local government or any instrumentality thereof that is inconsistent with clause (iv) may petition the Commission for relief.

(C) Definitions

For purposes of this paragraph—

- (i) the term “personal wireless services” means commercial mobile services, unlicensed wireless services, and common carrier wireless exchange access services;
- (ii) the term “personal wireless service facilities” means facilities for the provision of personal wireless services; and
- (iii) the term “unlicensed wireless service” means the offering of telecommunications services using duly authorized devices which do not require individual licenses, but does not mean the provision of direct-to-home satellite services (as defined in section 303(v) of this title).

Id.

44. See 47 U.S.C. § 332(c)(7) (preserving local government zoning authority subject to certain limitations); see also Heverly, *supra* note 4, at 4-5 (explaining structure of 47 U.S.C. § 332(c)(7)).

45. See Heverly, *supra* note 4, at 4-5 (describing regulatory framework of 47 U.S.C. § 332(c)(7)).

46. 47 U.S.C. §§ 332(c)(7)(B)(i) & (iv) (imposing substantive requirements). The conference report explains the purposes and scope of these substantive requirements. See H.R. CONF. REP. NO. 104-458, at 208.

Concerning section 332(c)(7)(B)(i)(I), the conferees stated that “functionally equivalent services” refers “only to personal wireless services . . . that directly compete against one another.” *Id.* Conferees intended that this language would prevent a local government from unreasonably favoring one PWS competitor over another. Additionally, they stated that the language “unreasonably discriminate” provides flexibility for the local governments to “treat facilities that create different visual, aesthetic, or safety concerns differently to the extent permitted under generally applicable zoning requirements even if those facilities provide functionally equivalent services.” *Id.* The language is “unreasonably discriminate,” not simply “discriminate.”

The conferees explained that section 332(c)(7)(B)(i)(II) is intended to ensure that local regulation, either expressly or through practice, does not prevent the provision of wireless service in a given area. See *id.* Further, it was their intent that PWS facility siting issues be made on a case-by-case basis. See *id.*

47. See Heverly, *supra* note 4, at 5 (explaining effect of substantive requirements).

ment act on a PWS facility siting application within a reasonable period of time; and (2) that PWS siting decision denials be in writing and supported by substantial evidence contained in a written record.⁴⁸

Last, section 332(c)(7) provides for expedited review of denials of PWS zoning permits to either the federal or state courts—and not to the slow moving FCC.⁴⁹

III. ANALYSIS

A. *Judicial Interpretation of the Breadth TCA's Preemption*

To say that there has been voluminous litigation concerning the scope and degree of federal preemption under section 332(c)(7) would be an understatement. The speed and level of litigation has been attributable to the statute's expedited judicial review provision.⁵⁰ This section will review how the federal courts have been interpreting section 332(c)(7). The goal is to determine the level of federal preemption and simultaneously illustrate the parameters of legitimate local governmental regulation of PWS facility siting. Specifically, this section will analyze how courts have interpreted two of the three substantive requirements and the two procedural requirements mandated by the TCA.⁵¹

1. *Unreasonable Discrimination Among Providers of Functionally Equivalent Services*

The section 332(c)(7)(B)(i)(I) substantive requirement prohibiting unreasonable discrimination among providers of functionally equivalent services prevents local governments from favoring existing technologies

48. See 47 U.S.C. §§ 332(c)(7)(B)(ii)-(iii) (1994 & Supp. 1997). The conference report states that the "reasonable period of time" language of section 332(c)(7)(B)(ii) is not intended to give special treatment to PWS facility siting requests. See H.R. CONF. REP. NO. 104-458, at 208. Further, the report explains that the language "substantial evidence contained in a written record" means the traditional standard used for judicial review of administrative agency actions. *Id.*

49. See 47 U.S.C. § 332(c)(7)(B)(v) (1994 & Supp. 1997) (providing expedited judicial review of local government PWS siting decisions with federal and state courts).

50. See *id.* (providing expedited judicial review). This provision provides that review of local government decisions should not be obtained at the FCC in Washington, D.C., but instead expedited review should be obtained judicially from local federal and state courts. See *id.* Section 332(c)(7)(B)(v) is seen as a victory for local governments because of the belief that the local courts provide a more neutral forum than the FCC. See NATIONAL LEAGUE OF CITIES ET AL., *supra* note 22, at 7 ("State and federal courts provide a more neutral and much less costly arena for parties to resolve disputes than the FCC, where industry attorneys have a decided financial and practical advantage over city and county attorneys.").

51. See 47 U.S.C. § 332(c)(7)(B)(v) (providing for review by FCC when local government makes PWS siting decision on basis of health or environmental effects of radio frequency emissions). This is the only basis for which an adversely effected party can appeal to the FCC. See NATIONAL LEAGUE OF CITIES ET AL., *supra* note 22, at 7.

and PWS providers over emerging technologies and new PWS providers.⁵² The courts have explained that section 332(c)(7)(B)(i)(I) does not preempt all local government discrimination among competing PWS providers, but rather it only preempts unreasonable discrimination.⁵³ Further, reviewing courts have opined that the test for reasonableness is whether the local governmental body had a legitimate basis for their discrimination.⁵⁴

The United States Court of Appeals for the Fourth Circuit was the first federal appellate court to review an action under section 332(c)(7). In *AT&T Wireless PCS v. City Council of Virginia Beach*,⁵⁵ the Fourth Circuit found that the defendant city council did not violate the proscription against unreasonable discrimination and granted the defendant's motion for summary judgment.⁵⁶ In the case, the plaintiffs applied for a conditional use permit to erect two 135-foot PCS towers in a wooded residential district.⁵⁷ Four different PWS providers—two PCS and two cellular—were to be collocated on the two PWS towers.⁵⁸ The Fourth Circuit stated that discrimination among competing PWS providers was virtually impossible because the defendant rejected the application for a conditional use permit that affected all four providers equally.⁵⁹ Although the court noted that no discrimination was possible, the court went on to hold that even if

52. See *Sprint Spectrum L.P. v. Town of Easton*, 982 F. Supp. 47, 51-52 (D. Mass. 1997) (commenting that purpose of requirement is to prevent existing providers from being sheltered from competition).

53. See *AT&T Wireless PCS, Inc. v. City Council of Virginia Beach*, 155 F.3d 423, 427 (4th Cir. 1998) (stating "the obvious point that the Act explicitly contemplates that some discrimination . . . is allowed."); *Cellular Tel. Co. v. Zoning Bd. of Adjustment of Ho-Ho-Kus*, 24 F. Supp. 2d 359, 373 (D.N.J. 1998) (opining that it is not enough for courts to discern discrimination; they must discern unreasonable discrimination); *Cellco Partnership v. Town Plan and Zoning Comm'n of Farmington*, 3 F. Supp. 2d 178, 185-86 (D. Conn. 1998) (same); *Sprint Spectrum L.P. v. Jefferson County*, 968 F. Supp. 1457, 1468 (N.D. Ala. 1997) (stating that it is not enough for plaintiffs to show unequal treatment).

54. See *Jefferson County*, 968 F. Supp. at 1467-68 (stating that "[a]n inquiry into the reasonableness of governmental action focuses on whether a 'legitimate basis' for the contested action is presented."); see also *Ho-Ho-Kus*, 24 F. Supp. 2d at 374 (holding that there is no unreasonable action if zoning authority has legitimate basis for its decision).

For a basis to be legitimate, the basis must be legitimate under both the state zoning law and TCA. See *id.* (finding legitimate basis where defendant applied legal standards prescribed in relevant zoning enabling law); *Town of Easton*, 982 F. Supp. at 51 (holding defendant zoning board illegally relied on bases proscribed by TCA and applicable zoning requirements).

55. 155 F.3d 423 (4th Cir. 1998).

56. See *id.* at 427 (finding no unreasonable discrimination).

57. See *id.* at 424.

58. See *Abrams*, *supra* note 26, at 7 (defining collocation as: "the placement of more than one carrier's antenna array upon a single monopole, tower, building, or structure."); see also *City Council of Virginia Beach*, 155 F.3d at 427.

59. See *City Council of Virginia Beach*, 155 F.3d at 427 (characterizing plaintiffs' allegation as "dubious at best").

discrimination was present, it was reasonable.⁶⁰ The court noted that the city council members weighed the need for the new towers against constituent concerns that arose during the permit hearings.⁶¹ Most significantly, the court said it was not unreasonable for the defendant to cite the sufficient quality of existing analog wireless service as a basis for the permit denial so long as there was a weighing of concerns.⁶²

Similarly, in *Cellular Telephone Co. v. Zoning Board of Adjustment of Ho-Ho-Kus*,⁶³ the United States District Court for the District of New Jersey found no unreasonable discrimination and granted defendant's motion for summary judgment.⁶⁴ The court held that there was no evidence that the decision favored one carrier over the other.⁶⁵ Citing the Fourth Circuit's rationale in *City Council of Virginia Beach*, the court opined that there could be no discrimination in denying variances for a tower in which three PWS competitors sought to collocate.⁶⁶ Further, the court, applying the legal standards set forth in the state zoning enabling legislation, noted that if there was discrimination, it was not unreasonable because the zoning board had a legitimate basis for denying the variances.⁶⁷

Conversely, the United States District Court for the District of Massachusetts held in *Sprint Spectrum L.P. v. Town of Easton*⁶⁸ that defendant zoning board of appeals unreasonably discriminated among PWS providers when it denied a special permit for a PCS provider in an area where cellular service was provided.⁶⁹ Although other courts have found no unreasonable discrimination where zoning boards have chosen existing PWS providers over new providers, in all those situations the respective governmental entities had a legitimate zoning basis for their decision.⁷⁰ The court in *Town of Easton* found no such legitimate basis—only general citi-

60. *See id.* (commenting that even if defendant discriminate it did not do so unreasonably, "under any possible interpretation").

61. *See id.* (noting that defendant balanced competing needs and concerns).

62. *See id.* at 428 (stating that it was legitimate for defendant to consider quality of existing analog PWS service).

63. 24 F. Supp. 2d 359 (D.N.J. 1998).

64. *See id.* at 374.

65. *See id.* (finding no evidence that defendant favored one PWS provider over another).

66. *See id.* (writing that denial of variances equally affected all three PWS providers) (citing *City Council of Virginia Beach*, 155 F.3d at 426).

67. *See id.* (opining that any possible discrimination was reasonable because defendant demonstrated legitimate basis to discriminate).

68. 982 F. Supp. 47 (D. Mass. 1997).

69. *See id.* at 51-52.

70. *See City Council of Virginia Beach*, 155 F.3d at 428 (explaining that city council appropriately applied applicable legal standards in their decisionmaking process); *Ho-Ho-Kus*, 24 F. Supp. 2d at 374 (finding zoning board's decision to be "unquestionably legitimate" in light application of applicable legal standards).

zen complaints.⁷¹ The court then issued an affirmative injunction ordering the zoning board to grant the special permit.⁷²

2. *Prohibitions on the Provision of Personal Wireless Service*

The underlying purpose of the section 332(c)(7)(B)(i)(II) substantive requirement against local prohibitions and de facto prohibitions on the provision of wireless service is to enable the telecommunications industry to create a national PWS infrastructure. Currently, there is a split of authority in interpreting this substantive requirement. Some courts have interpreted this requirement as only disallowing blanket bans or policies that have the effect of prohibiting wireless service.⁷³ Under this narrow interpretation, individual zoning decisions are exempt from judicial scru-

71. See *Town of Easton*, 982 F. Supp. at 51 (concluding that “[b]y deciding as it did, the Board favors existing [PWS] providers, sheltering them from the very competition Congress sought to create when it enacted TCA”).

The United States District Court for the Northern District of Alabama found that vague assertions of the public interest, without supporting evidence, is an illegitimate basis. See *Sprint Spectrum L.P. v. Jefferson County*, 968 F. Supp. 1457, 1468 (N.D. Ala. 1997) (finding no legitimate basis).

Similarly, because defendant zoning authority did not have an of-the-record legitimate basis, the United States District Court for the District of New Mexico held the defendant unreasonably discriminated. See *Western PCS II Corp. v. Extraterritorial Zoning Auth. of Santa Fe*, 957 F. Supp. 1230, 1237-38 (D.N.M. 1997). Defendant sought to place a PCS tower on top of an existing water tower to provide service along the I-25 corridor. See *id.* at 1237. The denial of the special exception benefitted existing analog providers. See *id.* at 1237-38. Lack of a legitimate basis for the “discrimination” made the discrimination “unreasonable.” See *id.* at 1238.

72. See *Town of Easton*, 982 F. Supp. at 53. Because section 332(c)(7)(B)(v) provides for expedited review of PWS siting decisions, reviewing courts uniformly have declined to remand their decisions to the relevant local governmental entities. See 47 U.S.C. § 332(c)(7)(B)(v) (1994 & Supp. 1997); see also *Abrams*, *supra* note 26, at 4 (stating that § 332(c)(7)(B)(v) authorizes reviewing courts to grant mandamus relief); see, e.g., *Cellco Partnership v. Town Plan and Zoning Comm’n of Farmington*, 3 F. Supp. 2d 178 (D. Conn. 1998) (granting affirmative injunction to prevent further delay); *Omnipoint Corp. v. Zoning Hearing Bd. of Pine Grove Township*, No. CIV.A.97-7088, 1998 WL 634909, at *5 (E.D. Pa. Sept. 16, 1998) (same); *Virginia Metronet, Inc. v. Board of Supervisors of James City County*, 984 F. Supp. 966, 977 (E.D. Va. 1998) (ordering defendant to issue special use permit); *Jefferson County*, 968 F. Supp. at 1469 (granting writ of mandamus); *Illinois RSA No. 3, Inc. v. County of Peoria*, 963 F. Supp. 732, 747 (C.D. Ill. 1997) (ordering issuance of special use permit); *Extraterritorial Zoning Auth. of Santa Fe*, 957 F. Supp. at 1240 (granting writ of mandamus); *BellSouth Mobility Inc. v. Gwinnett County*, 944 F. Supp. 923, 929 (N.D. Ga. 1996) (same). Instead the federal courts have favored injunctive and mandamus relief because these are more in line with the spirit of expedited review. See *Abrams*, *supra* note 26, at 4 (commenting that remanding back to zoning boards would frustrate purposes of TCA); see also *Gwinnett County*, 944 F. Supp. at 929 (recognizing Congressional intent to expedite reviews and remedies) (citing H.R. CONF. REP. NO. 104-458, at 208 (1996)).

73. See, e.g., *City Council of Virginia Beach*, 155 F.3d at 420 (explaining requirement applies to blanket bans and policies).

tiny.⁷⁴ Conversely, other courts read the requirement broadly also to encompass facially neutral policies that necessarily result in the denial of any or all PWS tower applications.⁷⁵

The Fourth Circuit, in *City Council of Virginia Beach*,⁷⁶ read the limitation narrowly, applying only to blanket bans or policies and not to individual decisions.⁷⁷ In finding for the defendant zoning board, the court expressly rejected plaintiff's case-by-case approach to section 332(c)(7)(B)(i)(II), noting that a case-by-case approach was only provided for in section 332(c)(7)(B)(i)(I).⁷⁸

The United States District Court for the District of Connecticut held in *Cellco Partnership v. Zoning Commission of Farmington*⁷⁹ that section 332(c)(7)(B)(i)(II) violations are evidenced by general biases against granting zoning permits for PWS providers who propose facilities similar to that of the current applicant.⁸⁰ In *Cellco Partnership*, the plaintiff applied to the town for a special use permit to construct cellular antennas within a church steeple.⁸¹ The court found for the defendant because

74. See generally *Cellco Partnership*, 3 F. Supp. 2d at 178 (explaining that § 332(c)(7)(I)(II) does not apply to individual zoning decisions).

75. See, e.g., *Virginia Metronet*, 984 F. Supp. at 971 (opining that § 332(c)(7)(B)(I)(II) also applies to facially neutral policies and regulations).

76. For a discussion of facts of this case, see *supra* notes 55-62 and accompanying text.

77. See *City Council of Virginia Beach*, 155 F.3d at 428 (reading limitation to cover only blanket bans or policies that effectuate bans); see also *Cellular Tel. Co. v. Zoning Bd. of Adjustment of Ho-Ho-Kus*, 24 F. Supp. 2d 359, 374 (D.N.J. 1998) (describing Fourth Circuit's decision in *City Council of Virginia Beach* as the "strictest interpretation of this provision to date"). In *Ho-Ho-Kus*, the court found for the defendant zoning board under both the narrow and the broad interpretation. See *id.* at 375 (holding zoning board did not prohibit provision of PWS under either interpretation).

78. See *City Council of Virginia Beach*, 155 F.3d at 429 (rejecting plaintiff's case-by-case proposed interpretation). The court opined a case-by-case approach to section 332(c)(7)(B)(i)(II) would "effectively nullify local authority by mandating approval of all (or nearly all) applications . . ." *Id.* at 428. The court reasoned that such an interpretation would be contrary to section 332(c)(7)(B)(iii), which implies that local governments retain the authority to deny tower siting applications. See *id.* (reconciling § 332(c)(7)(B)(I)(II) with § 332(c)(7)(B)(iii)). Additionally, the court stated that this interpretation would not, as plaintiff's counsel argued, render section 332(c)(7)(B)(i)(II) meaningless because moratoria would still undergo judicial scrutiny. See *id.* (noting application of § 332(c)(7)(B)(I)(II) in several moratoria cases). For a discussion of moratoria cases, see *infra* notes 97-113 and accompanying text.

Further, the Fourth Circuit noted that its narrow construction of section 332(c)(7)(B)(I)(II) "simultaneously furthers the Act's explicit goals of facilitating competition, by strengthening the hand of new market entrants who cannot show that they have been unreasonably discriminated against, and of preserving a large portion of local authority by maintaining that authority in particular cases." *Id.*

79. 3 F. Supp. 2d 178 (D. Conn. 1998).

80. See *id.* (holding no § 332(c)(7)(B)(I)(II) violation because plaintiff did not offer any evidence of defendant's general bias against granting permits for PWS facilities that are similar to plaintiff's proposal).

81. See *id.* at 181.

there was no general bias against granting such permits.⁸² Any allegation of bias was dubious in light of the defendant's grant of plaintiff's similar applications in the past.⁸³

Conversely, in *Western PCS II Corp. v. Extraterritorial Zoning Authority of Santa Fe*,⁸⁴ the United States District Court for the District of New Mexico adopted a broad interpretation of the provision.⁸⁵ In *Extraterritorial Zoning Authority of Santa Fe*, the court held that the defendant zoning authority effectuated a prohibition when they denied plaintiff's special exception application.⁸⁶ In order to provide PCS service to the narrow I-25 corridor, plaintiff wanted to construct a tower atop an existing water tower.⁸⁷ Key to the court's holding was the extremely small amount of siting location options.⁸⁸ Thus, by denying plaintiff's application, the zoning authority effectively prohibited the introduction of PCS service into the region.⁸⁹

The real significance of *Extraterritorial Zoning Authority of Santa Fe* is the court's finding that there was a prohibition on the provision of wireless service in an area that already had wireless service—cellular service.⁹⁰ Thus, the court held that a prohibition on the provision of PCS service alone was a prohibition on the provision of PWS in general.⁹¹

1. *Local Government Action Within a Reasonable Time*

Section 332(c)(7)(B)(ii) mandates that local governments process applications and decide PWS facility siting matters within a reasonable amount of time.⁹² The purpose of this requirement is to facilitate a rapid and orderly creation of a national PWS infrastructure.⁹³ The provision does not require the local government to act within a finite amount of

82. *See id.* at 184.

83. *See id.* (stating that defendant approved similar PWS-related application for plaintiff).

84. 957 F. Supp. 1230 (D.N.M. 1997).

85. *See id.* at 1238 (adopting broad interpretation of § 332(c)(7)(B)(i)(II)).

86. *See id.* (opining that denial of special exception effectuated prohibition).

87. *See id.* at 1234.

88. *See id.* at 1237-38 (noting extremely small amount of siting location options as factor in holding).

89. *See id.* at 1238 (citing effective denial of PCS service).

90. *See id.* (noting existing cellular service in I-25 corridor).

91. *See id.* (opining that PCS technology is more advanced than cellular technology, therefore, denial of special exception effectively denies provision of this new technology and its advantages).

92. *See* 47 U.S.C. § 332(c)(7)(B)(iii) (1994 & Supp. 1997) (mandating that applications be processed and decided with reasonable time).

93. *See* Sprint Spectrum L.P. v. Jefferson County, 968 F. Supp. 1457, 1467-68 (N.D. Ala. 1997) (discussing purpose of § 332(c)(7)(B)(ii) (1994 & Supp. 1997): "By such language, 'Congress has tried to stop local authorities from keeping wireless providers tied up in the hearing process.'") (quoting *Westel-Milwaukee Co., Inc. v. Walworth County*, 556 N.W.2d 107, 109 (Wis. 1996)).

time.⁹⁴ The reasonableness requirement takes into account the nature and scope of the PWS applicant's request.⁹⁵ Although the provision's purpose is to expedite local governmental action, it does not mandate that PWS facility related applications get special treatment.⁹⁶

Litigation under section 332(c)(7)(B)(ii) has arisen generally under two types of circumstances. The first is when local governmental entities have initiated moratoria on the granting of PWS facility siting permits or the processing of applications altogether.⁹⁷ Courts have tended to uphold moratoria on the granting of new permits, so long as the entity still accepted and processed applications.⁹⁸ On the other hand, courts have been hostile to moratoria on the application process itself.⁹⁹ The other area in which section 332(c)(7)(B)(ii) litigation has arisen is when the local entity simply takes too much time to grant or to deny the PWS provider's application.¹⁰⁰ In this situation, courts, following the provision's mandate, have applied a reasonable under the circumstances approach.¹⁰¹

94. See 47 U.S.C. § 332(c)(7)(B)(ii) (designating no specific time period for action on PWS siting decisions).

95. See *id.* (providing that processing governmental entity take "into account the nature and scope of such request"); see also NATIONAL LEAGUE OF CITIES ET AL., *supra* note 22, at 6 (commenting that reasonableness is measured in light of nature of request).

96. See NATIONAL LEAGUE OF CITIES ET AL., *supra* note 22, at 6 (noting that applicable local governmental entity is not required to provide preferential treatment).

97. See, e.g., *Sprint Spectrum L.P. v. Town of Farmington*, No. 3:97 CV863 (GLG), 1997 WL 631104, at *6 (D. Conn. Oct. 6, 1997) (involving moratoria that prevented PWS facility siting applications altogether); *Sprint Spectrum, L.P. v. City of Medina*, 924 F. Supp. 1036, 1040 (W.D. Wash. 1996) (involving moratorium on issuance of special use permits for siting of PWS facilities).

98. See *Abrams*, *supra* note 26, at 4-5 (commenting on validity of moratoria that only prevent issuance of permits for short period of time); see, e.g., *City of Medina*, 924 F. Supp. at 1040 (upholding moratorium on issuance of permits).

99. See *Abrams*, *supra* note 26, at 4-5 (commenting on judicial hostility to long moratoria that bar application altogether); see, e.g., *Town of Farmington*, 1997 WL 631104, at *6 (declaring moratoria violative of § 332(c)(7)(B)(ii)).

100. See, e.g., *Cellular Tel. Co. v. Zoning Bd. of Adjustment of Ho-Ho-Kus*, 24 F. Supp. 2d 359, 364 (D.N.J. 1998) (holding that two and one half years was not unreasonable under circumstances); *Illinois RSA No. 3, Inc. v. County of Peoria*, 963 F. Supp. 732, 745 (C.D. Ill. 1997) (finding that six months was not unreasonable under § 332(c)(7)(B)(ii)).

101. See *Ho-Ho-Kus*, 24 F. Supp. 2d at 364 (reasoning that "[t]he amount of time which elapsed while plaintiffs' application was pending is not dispositive as to whether there was unreasonable delay because 'each situation must be independently examined.'" (quoting *Virginia Metronet, Inc. v. Board of Supervisors of James City County*, 984 F. Supp. 966, 977 (E.D. Va. 1998))).

a. Moratoria

In *Sprint Spectrum, L.P. v. City of Medina*,¹⁰² the United States District Court for the Western District of Washington upheld a six-month moratorium on the issuance of permits for PWS facilities.¹⁰³ Five days after the enactment of the TCA, the defendant city adopted a moratorium to allow the city time to update its regulations to conform with the new law.¹⁰⁴ The court upheld the moratorium as very reasonable under the circumstances.¹⁰⁵

In contrast, in *Sprint Spectrum L.P. v. Town of Farmington*,¹⁰⁶ the United States District Court for the District of Connecticut held that a nine-month moratorium that barred PWS providers from even applying for a zoning application was violative of section 332(c)(7)(B)(ii).¹⁰⁷ The court distinguished the moratorium in this case with the moratorium in *City of Medina*.¹⁰⁸ Unlike the moratorium in *City of Medina*, the Farmington moratorium not only barred issuance of permits, but also barred applications and the processing thereof.¹⁰⁹ Further, the court noted that Farmington passed its moratorium sixteen months after enactment of the TCA, not five days, and almost nine months after the plaintiff's first zoning application.¹¹⁰ Similarly, in *Sprint Spectrum L.P. v. Jefferson County*,¹¹¹ the United States District Court for the Northern District of Alabama invalidated a moratorium that prevented the processing of applications.¹¹² The court reasoned that the local government failed to act on the applications within a reasonable period of time.¹¹³

102. 924 F. Supp. 1036 (W.D. Wash. 1996).

103. *See id.* at 1040 (upholding moratorium).

104. *See id.* at 1037-38 (noting resolution suspends issuing of permits but not processing of permits). The city anticipated a considerable increase in PWS facility siting applications and the city felt that it needed time to prepare. *See id.*

105. *See id.* at 1039. The court explained that the moratorium is not a prohibition on wireless facilities, nor does it have a prohibitory effect. It is, rather, a short-term suspension of permit-issuing while the City gathers information and processes applications. Nothing in the record suggests that this is other than a necessary and bona fide effort to act carefully in a field with rapidly evolving technology. Nothing in the moratorium would prevent Sprint's application, or anyone else's, from being granted.

Id.

106. No. 3:97 CV863 (GLG), 1997 WL 631104 (D. Conn. Oct. 6, 1997).

107. *See id.* at *5-6 (striking down nine month moratorium barring applications).

108. *See id.* at *6 (distinguishing moratorium in *City of Medina*).

109. *See id.*

110. *See id.* (comparing moratorium passage dates).

111. 968 F. Supp. 1457 (N.D. Ala. 1997).

112. *See id.* at 1468 (invalidating moratorium under 47 U.S.C. § 332(c)(7)(B)(ii) (1994 & Supp. 1997)).

113. *See id.* (opining that defendant "has not kept plaintiffs 'tied up in the hearing process': it has excluded them from the process altogether").

b. Duration of Decisionmaking Period

In *Illinois RSA No. 3, Inc. v. County of Peoria*,¹¹⁴ the United States District Court for the Central District of Illinois held that six months was not an unreasonable period of time for deciding whether to issue a special use permit to the plaintiff PWS provider.¹¹⁵ The court noted that the defendant began working on the application immediately and that the defendant did not object to several continuances.¹¹⁶ Although the plaintiff offered evidence that the usual duration of zoning procedures was two to three months, the court opined that six months is not per se unreasonable.¹¹⁷

Comparatively, the court in *Ho-Ho-Kus* ruled that a much longer period—two and one half years—was a reasonable period of time for section 332(c)(7)(B)(ii) purposes.¹¹⁸ Over the two and one half year period, the defendant held forty-five public hearings.¹¹⁹ The hearings were conducted in a quasi-judicial format employing rules of evidence.¹²⁰ Further, the court noted that the plaintiffs offered the majority of testimony at the hearings.¹²¹ And, as in *County of Peoria*, the plaintiffs never objected to any of the continuances or complained that the length of the process violated section 332(c)(7)(B)(ii).¹²²

4. *Denials in Writing and Supported by Substantial Evidence in a Written Record*

Section 332(c)(7)(B)(iii) provides that any decision by a local government to deny an application for a PWS facility siting “shall be in writing

114. 963 F. Supp. 732 (C.D. Ill. 1997).

115. *See id.* at 745-46 (holding six-month time period reasonable).

116. *See id.* (discussing “usual durations” of zoning procedures and reasonableness of lengths of time).

117. *See id.* (finding length of time did not violate § 332(c)(7)(B)(ii)). Important to the court’s ruling of reasonableness was the plaintiff’s generally permissive approach to the scheduling of the necessary hearings as well as the plaintiff’s failure to object to several continuances. *See id.* (listing factors considered in its decision).

118. *See Cellular Tel. Co. v. Zoning Bd. of Adjustment of Ho-Ho-Kus*, 24 F. Supp. 2d 359, 365 (D.N.J. 1998) (finding that time period was reasonable under circumstances).

119. *See id.* at 363-64 (noting Board’s action regarding plaintiff’s application).

120. *See id.* at 365 (noting that defendant provided fair public forum for application). The defendant zoning board allowed for presentation of witnesses, cross examination and made reasonable accommodations for both parties when witnesses were unavailable. *See id.* Further, the zoning board limited public questioning to relevant issues. *See id.* at 364-65.

121. *See id.* at 364-65 (stating that majority of testimony was offered by plaintiffs).

122. *See id.* at 364 (noting that plaintiffs failed to complain about extensions of time and never suggested extended duration was “violative of TCA”). The court also stated that the zoning board made special accommodations for the application by expanding the number of monthly meetings from one to four during the final deliberative months. *See id.* (explaining defendant’s efforts to accommodate).

and supported by substantial evidence contained in a written record.”¹²³ Currently, there is a stark split of authority on the interpretation of this provision.¹²⁴ Because the Conference Report explains that “substantial evidence in a written record” refers to the traditional judicial review standard of administrative agencies, some courts have construed all of section 332(c)(7)(B)(iii) to be in conformity with traditional principles of federal administrative law.¹²⁵ These courts require local governments to issue formal decisions explaining the reasons for their decisions and linking their conclusions to evidence in the record.¹²⁶ Other courts take a different approach. Some courts interpret section 332(c)(7)(B)(iii) as simply requiring that: (1) the local government notify the applicant of the denial in writing; and (2) that the local government’s decision be supported by substantial evidence contained in a written record.¹²⁷ These courts do not require that the written notice of denial includes reasons for the decision and references to the written record. Beyond the issue of the character of the written denial, directed by the Conference Report, some courts have looked to federal law for a definition of substantial evidence and then to state zoning law to determine the weight of that evidence.¹²⁸ Although

123. 47 U.S.C. § 332(c)(7)(B)(iii) (1994 & Supp. 1997) (requiring decision to be in writing and supported by substantial record evidence).

124. Compare *Sprint Spectrum L.P. v. Town of North Stonington*, 12 F. Supp. 2d 247, 251 (D. Conn. 1998) (requiring written decision containing its reasons and links to supporting evidence in written record), with *AT&T Wireless PCS, Inc. v. City Council of Virginia Beach*, 155 F.3d 423, 429 (4th Cir. 1998) (requiring that denial simply be in writing).

125. See H.R. CONF. REP. NO. 104-204, at 208 (1996) (stating, “[t]he phrase ‘substantial evidence contained in a written record’ is the traditional standard used for judicial review of agency actions”); see also *Illinois RSA No. 3, Inc. v. County of Peoria*, 963 F. Supp. 732, 743 (C.D. Ill. 1997) (citing H.R. CONF. REP. NO. 104-204, at 208 in construing requirements of § 332(c)(7)(B)(iii)).

126. See, e.g., *Primco Personal Communications, L.P. v. Village of Fox Lake*, 26 F. Supp. 2d 1052, 1063 (N.D. Ill. 1998) (holding that Congress prescribed application of federal principles of administrative law); *Town of North Stonington*, 12 F. Supp. 2d at 251 (requiring decision similar to that of traditional federal administrative law); *County of Peoria*, 963 F. Supp. at 743 (discussing federal administrative law and noting lack of written statement in record giving reasons for court’s decision); *Western PCS II Corp. v. Extraterritorial Zoning Auth. of Santa Fe*, 957 F. Supp. 1230, 1236 (D.N.M. 1997) (analyzing federal requirement for written denial and rational behind it).

127. See *City Council of Virginia Beach*, 155 F.3d at 429 (interpreting § 332(c)(7)(B)(iii) narrowly); *Gearon & Co. v. Fulton County*, 5 F. Supp. 2d 1351, 1354 (N.D. Ga. 1998) (applying narrow interpretation to statute).

128. See, e.g., *Cellular Tel. Co. v. Zoning Bd. of Adjustment of Ho-Ho-Kus*, 24 F. Supp. 2d 359, 365-67 (D.N.J. 1998) (looking to federal administrative law for definition of substantial evidence, but looking to state zoning law to find standards to weigh evidence). The *Ho-Ho-Kus* court determined that substantial evidence in the context of federal administrative law means, “more than a mere scintilla, but may be less than a preponderance.” *Id.* at 366 (quoting *Alexander v. Shalala*, 927 F. Supp. 785, 791 (D.N.J. 1995)). Additionally, the court looked to New Jersey zoning law as the standard to determine whether the weight of the evidence was substantial. See *id.* In this case, the plaintiffs argued that the court should not look to state law because TCA preempted state authority in the area of PWS facility siting.

these courts state that section 332(c)(7)(B)(iii) still requires reviewing courts to apply substantive standards of applicable state and local zoning law, they have applied a more rigorous review to permit denials.¹²⁹ Other courts have expressly rejected the application of federal administrative law's interpretation of substantial evidence.¹³⁰

In *County of Peoria*, the United States District Court for the Central District of Illinois held that the defendant county violated section 332(c)(7)(B)(iii) by memorializing its decision in a simple written denial.¹³¹ The court found the defendant's written denial insufficient because it did not explain the county's reasons for the decision and did not refer to any evidence in the record.¹³² The court opined that these were critical elements under the TCA's statutory scheme.¹³³ It reasoned that a detailed written decision of denial is needed to allow for effective and efficient judicial review.¹³⁴

Recently, the United States Court of Appeals for the Second Circuit, in *Cellular Telephone Co. v. Town of Oyster Bay*,¹³⁵ applied federal principles of administrative law to define substantial evidence.¹³⁶ The Second Circuit reviewed two denials of special use permit applications to erect analog

See id. The court responded and stated that TCA expressly preserved state authority. *See id.* The court reasoned, "the requirement of the TCA that a denial by a state or local government . . . be in writing and based upon substantial evidence 'does not affect or encroach upon the substantive standards to be applied under established principles of state and local law.'" *Id.* (citing *AT&T Wireless Services of Florida, Inc. v. Orange County*, 994 F. Supp. 1422, 1426 (M.D. Fla. 1997)).

129. *See Cellular Tel. Co. v. Town of Oyster Bay*, 166 F.3d 490, 493 (2d Cir. 1999) (opining that traditional, deferential review of local zoning decisions is not applicable to review under TCA).

130. *See, e.g., City Council of Virginia Beach*, 155 F.3d at 429 (rejecting application of federal administrative law principles).

131. *See County of Peoria*, 963 F. Supp. at 743 (ruling defendant violated § 332(c)(7)(B)(iii)). The defendant presented the plaintiff with the following written denial:

On June 11, 1996, the Peoria County Board DENIED your request for a Special Use for a utility communication tower in the R1 Zoning District.

You have the right to appeal this decision. You must file your appeal with the Peoria Circuit Clerk's Office. Please contact your attorney if you have questions about this letter.

Thank You for your cooperation.

Id.

132. *See id.* (noting statutory deficiencies of written denial).

133. *See id.* (noting reasons for violation).

134. *See id.* (explaining rationale behind need for written decision containing reasons and links to evidence in record).

135. 166 F.3d 490 (2d Cir. 1999).

136. *See id.* (opining that "substantial evidence, in the usual context, has been construed to mean less than a preponderance, but more than a scintilla of evidence. 'It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" (quoting *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951) (defining language "substantial evidence" as used in Administrative Procedure Act, 5 U.S.C. § 706(2)(E) (1994))).

cellular towers on top of two existing water towers.¹³⁷ The defendant town held a hearing for each special use permit application.¹³⁸ At the hearings, the applicants presented evidence of the need for the two towers to remedy a coverage gap and evidence that the towers would not alter the character of the town.¹³⁹ The defendant town, however, presented no evidence supporting the denial of the special use permit, and citizen protestants voiced only isolated concerns about the perceived health effects of the towers.¹⁴⁰ Despite that there were only occasional remarks from a citizen protestant about property values and aesthetics, the town denied the special use permits because of these citizen concerns.¹⁴¹ The Second Circuit held that the town's denials violated section 332(c)(7)(B)(iii) because the record did not contain substantial evidence as defined under principles of federal administrative law.¹⁴²

Conversely, the Fourth Circuit held in *City Council of Virginia Beach* that the defendant city council's decision did not violate section 332(c)(7)(B)(iii) when it failed to provide a written decision containing its reasons for denial along with links to the written record.¹⁴³ The city council's decision was recorded in a two page summary of the minutes—describing the application, listing the names and views of all who testified at the hearing and recording the votes of each councilperson—and in a letter from the planning commission to the city council describing the application and stamped with the word “denied” and the date of the city council's vote.¹⁴⁴ The court reasoned that either one of these writings would satisfy the section 332(c)(7)(B)(iii) “in writing” requirement.¹⁴⁵ The court chastised the lower court for interpreting section 332(c)(7)(B)(iii) in the same manner as the Central District of Illinois in *County of Peoria*.¹⁴⁶ The Fourth Circuit explained that the provision really contains two separate requirements and courts, such as the court in *County*

137. *See id.* at 492 (describing defendant's denials of special use permits).

138. *See id.* (outlining process for obtaining special permits with presentation of witnesses and scientific evidence).

139. *See id.* (discussing evidence presented by AT&T in support of obtaining special permit). For a discussion of coverage gaps, see *supra* notes 28 & 32 and accompanying text.

140. *See Town of Oyster Bay*, 166 F.3d at 492 (stating that statutorily impermissible evidence of perceived health concerns dominated both hearings).

141. *See id.* (noting that town's denial rested on issues of aesthetics, environmental impact, air and noise quality and traffic and parking concerns).

142. *See id.* at 495-97 (invalidating town's special use permit denials).

143. *See AT&T Wireless PCS, Inc. v. City Council of Virginia Beach*, 155 F.3d 423, 429 (4th Cir. 1998) (ruling that defendant was in compliance with § 332(c)(7)(B)(iii) (1994 & Supp. 1997)).

144. *See id.* (noting city council's denial of application was consistent with its usual practice and it provided no written explanation for denial).

145. *See id.* (holding defendant satisfied § 332(c)(7)(B)(iii)).

146. *See id.* (explaining that lower court misconstrued provision).

of *Peoria*, have combined the two requirements improperly.¹⁴⁷ The Fourth Circuit held that “in writing” is a completely separate requirement from “substantial evidence in a written record.”¹⁴⁸ Further, the Fourth Circuit dismissed any concerns that a reviewing court needs a more substantive denial.¹⁴⁹ It reasoned that the separate substantial evidence requirement provides ample information to allow for effective and efficient judicial review.¹⁵⁰

B. *Competing Views of Congressional Intent in Interpretation of TCA's
Preemption Provisions*

Competing interpretations of congressional intent underlie the federal courts' decisions on the TCA's preemption provisions. Did Congress intend sweeping preemption of local government control over the siting of PWS facilities, or did they want no more preemption than necessary in order to implement the goals of the TCA? The difference of judicial opinion on this question is most evident in the substantive requirement against the prohibition of PWS services in section 332(c)(7)(B)(i)(II) and in the definition of substantial evidence as used in section 332(c)(7)(B)(iii). A court's particular interpretation of Congressional intent is determinative of the outcome on cases decided under these particular provisions. This Comment argues that Congress intended a more limited preemption of local control as illustrated by the Fourth Circuit's decision in *City Council of Virginia Beach*.

1. *An Illustration of the Two Views of Congressional Intent*

Emblematic of courts that have interpreted the preemption provisions broadly, the District of New Mexico in *Extraterritorial Zoning Authority*

147. *See id.* The court noted that the lower court combined these two requirements because the court read too much into the Conference Report's statement that substantial evidence was to be defined in the context of federal administrative law. *See id.* Simply put, the Fourth Circuit criticized the lower court for applying federal administrative law to the “in writing” requirement as well. *See id.* The Fourth Circuit noted that the lower court's requirement that all decisions be in writing, as well as contain rationales and links to evidence in the record, is the federal standard for judicial review of administrative adjudication and formal rule making. *See id.*; *see also* Administrative Procedure Act, 5 U.S.C. § 557(c) (1994) (providing procedural requirements for formal rulemaking and adjudication). The Fourth Circuit opined that if Congress wanted a more involved written decision, it would have required such a statement, as it did in other sections of the TCA. *See City Council of Virginia Beach*, 155 F.3d at 429 (stating that other sections of TCA contain similarly explicit language); *see also* 47 U.S.C. § 252(e)(1) (1994 & Supp. 1997) (requiring “written findings as to any deficiencies” of certain agreements); 47 U.S.C. § 271(d)(3) (1994 & Supp. 1997) (requiring FCC to “state the basis for its approval or denial” of certain applications).

148. *See City Council of Virginia Beach*, 155 F.3d at 429 (separating requirements).

149. *See id.* (rejecting “alleged necessity for judicial review” purposes).

150. *See id.* (ruling substantial evidence requirement provides for judicial review).

of *Santa Fe* applied section 332(c)(7)(B)(i)(II) against a prohibition of PWS services to an individual zoning permit decision.¹⁵¹ Although the municipality already had personal wireless services, the court held that the zoning authority's denial had the effect of prohibiting personal wireless services.¹⁵² Rationalizing its opinion, the court cited the TCA's goal of increasing competition by removing barriers to entry, however, the court did not cite the need to preserve local control. Underlying the court's decision was the belief that Congress intended to broadly preempt local zoning control, while only leaving nominal decisionmaking power.

Taking a distinctively different and more persuasive approach, the Fourth Circuit in *City Council of Virginia Beach* held that section 332(c)(7)(B)(i)(II)'s requirement against prohibitions on the provision of personal wireless services only preempted blanket bans or policies that have the effect of prohibiting wireless service.¹⁵³ Instead of addressing an individual zoning permit decision, the Fourth Circuit opined that section 332(c)(7)(B)(i)(II) addresses the larger regulatory framework or policy thereof.¹⁵⁴ The Fourth Circuit criticized courts that apply section 332(c)(7)(B)(i)(II) to individual zoning permit decisions, arguing that individual decisions are already substantively scrutinized by the prohibition on unreasonable discrimination between functionally equivalent services contained in section 332(c)(7)(i)(I).¹⁵⁵ The Fourth Circuit correctly opined that these courts misread the statutory framework of the preemption provisions.¹⁵⁶

The Fourth Circuit's rationale hinged on three points. First, applying section 332(c)(7)(i)(II) together with section 332(c)(7)(i)(I) to individual zoning permit decisions would make it almost impossible for a local zoning board to properly deny an application.¹⁵⁷ The court noted that the very existence of section 332(c)(7)(B)(iii), which prescribes proce-

151. For a discussion of the District of New Mexico's decision in *Extraterritorial Zoning Auth. of Santa Fe*, see *supra* notes 84-91 and accompanying text.

152. See *Western PCS II Corp. v. Extraterritorial Zoning Auth. of Santa Fe*, 957 F. Supp. 1230, 1238 (D.N.M. 1997) (holding that denial of permit to erect PCS tower by municipality that already had cellular service still violated § 332(c)(7)(B)(i)(II) (1994 & Supp. 1997)).

153. For a discussion of the Fourth Circuit's decision in *City Council of Virginia Beach*, see *supra* notes 76-78 and accompanying text.

154. See *Extraterritorial Zoning Authority of Santa Fe*, 957 F. Supp. at 1238 (opining that § 332(c)(7)(B)(i)(II) did not address individual zoning decisions).

155. See *City Council of Virginia Beach*, 155 F.3d at 429 (chiding courts that apply § 332(c)(7)(B)(i)(II) to individual zoning permit decisions).

156. See *id.* (disagreeing with courts applying § 332(c)(7)(B)(i)(II) to individual zoning applications).

157. See *id.* at 428 (opining that "any reading of subsection (B)(i)(II) [§ 332(c)(7)(B)(i)(II)] that allows the subsection to apply to individual decisions would effectively nullify local authority by mandating approval of all (or nearly all) applications, a result contrary to the explicit language of section (B)(iii) [§ 332(c)(7)(B)(iii)], which manifestly contemplates the ability of local authorities to 'deny a request'").

dural requirements for denials, illustrates that Congress intended local governments to retain the power to deny a permit.¹⁵⁸ Second, the Fourth Circuit reasoned that its more narrow interpretation of the statute has already proved effective in striking down moratoria.¹⁵⁹ Third, the court believed that their interpretation strikes a balance between the two competing goals of section 332(c)(7)—facilitating competition by removing unreasonable barriers to entry and preserving a large portion of local control in particular zoning decisions.¹⁶⁰

The other area where a court's particular view of congressional intent governs the outcome is in the definition of substantial evidence as used in section 332(c)(7)(B)(iii). In *Town of Oyster Bay*, the Second Circuit's application of federal administrative law principles in defining substantial evidence is based upon one sentence in the Conference Report.¹⁶¹ The Conference Report comments that, "[t]he phrase 'substantial evidence contained in a written record' is the traditional standard used for judicial review of agency decisions."¹⁶² It is with this one sentence, that the Second Circuit and other courts have bootstrapped the application of federal administrative law to local zoning decisions. The Second Circuit cites the United States Supreme Court's landmark decision in *Universal Camera Corp. v. NLRB*¹⁶³ in defining substantial evidence.¹⁶⁴ Application of that decision makes little sense when one considers that the Supreme Court in *Universal Camera* was interpreting the language of the federal Administrative Procedure Act ("APA") and not state administrative law.¹⁶⁵ Congress certainly did not intend to apply the APA to state and local administrative proceedings via one ambiguous sentence in a legislative report.

The Fourth Circuit in *City Council of Virginia Beach* applied a more lenient definition of substantial evidence in noting that the decisionmakers under section 332(c)(7)(B)(iii) are not federal administrative

158. See *id.* (commenting on existence of section 332(c)(7)(B)(iii) (1994 & Supp. 1997)).

159. See *id.* (citing *Sprint Spectrum L.P. v. Jefferson County*, 968 F. Supp. 1457, 1468 (N.D. Ala. 1997)); *Sprint Spectrum L.P. v. Town of Farmington*, No. 3:97 CV 863 (GLG), 1997 WL 631104, at *6 (D. Conn. Oct. 6, 1997); *Sprint Spectrum, L.P. v. City of Medina*, 924 F. Supp. 1036, 1040 (W.D. Wash. 1996); *Sprint Spectrum, L.P. v. Town of West Seneca*, 659 N.Y.S.2d 687, 690 (Sup. Ct. 1997).

160. See *City Council of Virginia Beach*, 155 F.3d at 428-29 (explaining need to balance two seemingly competing goals).

161. See *Cellular Tel. Co. v. Town of Oyster Bay*, 166 F.3d 490, 493 (2d Cir. 1999) (citing H.R. CONF. REP. NO. 104-458, at 470 (1996)).

162. H.R. CONF. REP. NO. 104-458, at 470.

163. 340 U.S. 474 (1951).

164. See *Town of Oyster Bay*, 166 F.3d at 494 (citing *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951) (discussing need for providing definition of substantial evidence)).

165. See *Universal Camera*, 340 U.S. at 476 (interpreting Administrative Procedure Act, 5 U.S.C. §§ 551-706 (1994 & Supp. 1997)).

agencies, but state and local administrative agencies and legislators.¹⁶⁶ Instead of applying the more searching standard encompassed in federal administrative law, the court used a reasonable decisionmaker approach.¹⁶⁷ In interpreting substantial evidence, the Fourth Circuit recognized that Congress refused to abolish local authority over zoning of personal wireless services.¹⁶⁸ The court noted that a more lenient definition was needed given the nature of zoning hearings. Under the Second Circuit's approach, the PWS industry's land use lawyers would always win given the level of sophistication of their evidentiary presentations compared to the much less sophisticated, and usually unorganized, effort that is typical of general citizen opposition.¹⁶⁹

2. *Why Congress Intended to Preserve More Local Control Than Many Courts Think*

What the Fourth Circuit confronts, and the Second Circuit and other courts ignore, is that section 332(c)(7) has two goals, not one. Courts like the Second Circuit have chosen to focus on the overarching goal of the TCA in general—increasing competition and reducing barriers to entry. These courts, however, have ignored the stated goal of section 332(c)(7) which is stamped across the provision—preservation of local zoning authority.¹⁷⁰ The courts that apply a broad interpretation of section 332(c)(7) fail to recognize that the preemption provisions that were originally encapsulated in the House bill are radically different from the ones that came out of the Conference Committee and were subsequently signed into law.¹⁷¹ Several members of the Conference Committee were unhappy with the sweeping preemption contained in the original House bill and sought to change it to preserve local control.¹⁷²

166. See *AT&T Wireless PCS, Inc. v. City Council of Virginia Beach*, 155 F.3d 423, 430 (4th Cir. 1998) (distinguishing between federal and state and local actors).

167. See *id.* (explaining that traditional federal administrative law is inapplicable to Virginia Beach City Council).

168. See *id.* (commenting on Congressional intent).

169. See *id.* at 431 (stating that “[a]ppellees [the applicants], by urging us to hold that such a predictable barrage mandates that local governments approve applications, effectively demand that we interpret the Act so as always to thwart average, nonexpert citizens; that is, to thwart democracy”).

170. See 47 U.S.C. § 332(c)(7) (1994 & Supp. 1997) (laying out regulatory framework entitled “Preservation of local zoning authority”).

171. See, e.g., *Cellular Tel. Co. v. Town of Oyster Bay*, 166 F.3d 490, 493 (2d Cir. 1999) (describing legislative intent). The Second Circuit mistakenly stated that the goal of section 332(c)(7) was to create “the National Wireless Telecommunications Siting Policy.” *Id.* This language, however, comes from the House Bill, which would have delegated zoning decisions to the FCC. See H.R. 1555, 104th Cong. § 107 (1995) (discussing congressional intent for telecommunications markets). This framework was defeated in Conference. See H.R. CONF. REP. NO. 104-458, at 470 (1996) (rejecting House bill's centralized regulatory framework).

172. For a discussion of the changes made by Conference Committee, see *supra* notes 41-42 and accompanying text.

Most of all, what these courts have failed to examine—beyond the legislative history of the TCA itself—was the general mood of the new Republican majority, the 104th Congress. This was a Congress whose stated goal was to return governmental power to state and local governments—devolution.¹⁷³ If the 104th Congress actually intended to pass a statute with a sweeping preemption provision, would they really have entitled it “Preservation of local zoning authority?”

IV. CONCLUSION

The ability of local governments to regulate the siting of PWS facilities has been curtailed by the passage of section 332(c)(7) in the TCA. One cannot examine the scope of the curtailment, however, without examining the numerous, and many times conflicting, judicial interpretations of the preemption provisions. It has been the job of the courts to balance the two stated goals of section 332(c)(7)—removing barriers to entry and preserving local zoning control of PWS facility siting decisions. Although there appears to be a split in judicial opinion over which one of these stated goals carries the most weight, the decision is far from settled.¹⁷⁴

The most important questions are what does this all mean for local governments and what does this all mean for the citizens who show up at local zoning boards to voice their concerns about a PWS facility siting. For local governments, it means that they will have to wade through the ever-increasing and ever-changing amount of case law on section 332(c)(7) in devising an effective and legal regulatory scheme. For the citizens at the zoning board hearings, it means that they will have to voice their concerns to local governmental officials who are just as confused as they are.

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173. See, e.g., REPUBLICAN NATIONAL COMMITTEE, *supra* note 39.

174. For a discussion on the split of judicial authority concerning Congressional intent, see *supra* notes 142-60 and accompanying text.

